Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Interconnection Between Local	)	CC Docket No. 95-185
Exchange Carriers and Commercial	)	
Mobile Radio Service Providers	)	
	)	
and	)	
	)	
Equal Access and Interconnection	)	CC Docket No. 94-54
Obligations Pertaining to Commercial	)	
Mobile Radio Service Providers	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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March 4, 1996

SUMMARY

In the *Notice*, the Commission raises policy issues concerning the regulation and establishment of compensation arrangements covering interconnection between commercial mobile radio service ("CMRS") providers and incumbent local exchange carriers ("ILECs"). However, in light of the Telecommunications Act of 1996 (the "1996 Act"), the CMRS-ILEC interconnection issues raised in the *Notice* cannot be divorced from broader issues concerning use of the ILECs' networks by all telecommunications carriers. The 1996 Act directs the Commission, under new Section 251(d), to implement regulations governing the ILECs' statutory obligations to provide all telecommunications carriers with cost-based, nondiscriminatory use of the ILEC networks. Under the new legislation, the Commission has no basis for distinguishing between carrier-to-carrier pricing in the ILEC-CMRS interconnection context *versus* pricing in the context of other telecommunications carriers making use of the ILEC networks to provide their telecommunications services.

Although Congress clearly designed to promote the development of alternative networks, where possible, the 1996 Act recognizes the unique role of the incumbent LEC network in the new telecommunications environment if competition is to develop in all markets. In particular, the statute directs the ILEC networks to be made available to all telecommunications carriers as an input to their services on cost-based, nondiscriminatory terms. The new Act also establishes mandatory safeguards that resolve the FCC's concerns in the *Notice* about how to curb the potential for ILEC abuses through the negotiated interconnection arrangement process: interconnection arrangements entered into between ILECs and other telecommunications carriers must be approved by state (or federal) regulators and be made available for public inspection. All carriers must be able to use an ILEC's network on the same terms and conditions made available to any other carrier.

Under the 1996 Act, the FCC is responsible for "establish[ing] regulations to implement" Section 251, which requires the ILECs to provide requesting telecommunications carriers with interconnection services and access to unbundled network elements on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Further, Section 252 requires cost-based rates. While the Commission must set national pricing standards governing the use of ILEC networks, implementation of those standards will be the primary responsibility of the states. The FCC cannot fulfill its statutory responsibilities without providing the states with guidance as to how ILECs must develop cost-based rates.

The *Notice* tentatively concludes that interconnection rates for local switching facilities and connection to end users should be "priced" on a zero-rate or "bill and keep" basis. Unless such zero-rate pricing is cost-justified, however, the 1996 Act does not allow it. These matters are best studied in the context of the more comprehensive proceeding required under Section 251(d).

With regard to transport between CMRS and ILEC networks, the cost-based pricing and nondiscrimination principles enunciated in the 1996 Act apply. CMRS providers, IXCs, and all other telecommunications carriers must pay the same for use of the ILEC network to the extent each use the same features and functions. CompTel strongly believes that the access transport rate *structure* in all of its particulars should be the same for CMRS interconnection and IXC access, including the option to pay a single charge for tandem switched transport between the ILEC "serving wire center" and end offices. To achieve cost-based transport *rates*, as required by the 1996 Act, however, and efficient use of the interoffice network, CompTel strongly urges the Commission to commence its promised Access Charge proceeding. Until that proceeding occurs, both CMRS providers and IXCs should be required to purchase access transport from the ILECs' existing access tariffs.

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] In the *Notice*, the Commission raises policy issues concerning the regulation and establishment of compensation arrangements covering interconnection between commercial mobile radio service ("CMRS") providers and incumbent local exchange carriers ("ILECs").[2]

CompTel submits that, in light of the Telecommunications Act of 1996 (the "1996 Act"), the CMRS-ILEC interconnection issues raised in the *Notice* cannot be divorced from

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[1] FCC 95-505 (released Jan. 11, 1996) ("Notice"); Supplemental Notice of Proposed Rulemaking, CC Docket No. 95-185, FCC 96-61 (released February 16, 1996) ("Supplemental Notice").

[2] It is clear in the *Notice* that when the Commission refers to local exchange carriers, it is referring to incumbent local exchange carriers. *See, e.g.*, ¶ 2 ("LECs unquestionably still possess substantial market power in the provision of local telecommunications services.").

the broader issues concerning use of the ILEC networks by telecommunications carriers that must be addressed in the shortly-to-be-noticed FCC rulemaking implementing Section 251 added by the 1996 Act.[3] In that proceeding, the Commission has the authority and the obligation to adopt rules governing the prices ILECs may charge telecommunications carriers for use of the ILECs' networks.

Under the new legislation, there is no basis for distinguishing between carrier-to-carrier pricing in the ILEC-CMRS interconnection context *versus* pricing in the context of other telecommunications carriers making use of the ILECs' networks to provide their telecommunications services. The new statute provides generally that when telecommunications carriers make use of ILEC network features and functions, the prices the ILEC charges must reflect the direct costs imposed on the ILEC network for the features and functionalities used and must be non-discriminatory. Thus, for example, where the costs for an ILEC to terminate a call on its network received from a CMRS provider are the same as when it terminates the call of an interexchange carrier ("IXC") (or any other telecommunications carrier), both the CMRS provider and the IXC should pay the same for the termination of the call. Accordingly, the FCC should adopt regulations ensuring non-discrimination between CMRS providers and all other telecommunications providers in the payment of cost-based rates for use of the ILEC networks.

I. STATEMENT OF INTEREST

CompTel is the principal industry association of competitive telecommunications providers. Its approximately 175 members offer a variety of telecommunications services that rely on use of the local exchange network. The *Notice* raises issues fundamental to the

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[3] 47 U.S.C. § 251(d).

prices ILECs may charge for such use. Accordingly, CompTel has a vital interest in the outcome of this proceeding.

II. THE 1996 ACT CLEARLY ESTABLISHES THE TREATMENT OF THE INCUMBENT LEC NETWORK AS A RESOURCE FOR THE USE OF OTHER TELECOMMUNICATIONS CARRIERS

A. The Old Regulatory Patchwork

Prior to enactment of the 1996 Act, a variety of regulatory constructs existed to govern situations when carriers had a need to interconnect with or access the ILEC local network. Characteristic of this patchwork approach, regulators sought and tried to maintain clear definitional lines between local and toll services, LECs and IXCs, and wireline and wireless services. For example, IXCs, as "customers" of the LECs, purchased "access services" pursuant to tariff for the origination and termination of interexchange traffic. In contrast, CMRS providers and independent LECs entered into non-tariffed "interconnection agreements" whereby access to the ILECs for termination of traffic originating on their own networks were governed by contract. The terms and conditions of these agreements were neither subject to public scrutiny necessarily nor generally available. In short, distinctions among services and service providers and their regulatory treatment were preserved despite the underlying reality that each use of the ILEC network involved the same features and functionalities.

B. The New Regime Under the 1996 Act

With the passage of the 1996 Act, the old multi-faceted regulatory approach must give way to a unified way of thinking about telecommunications carriers' use of the incumbent LEC network. A principal thrust of the new legislation is that carrier prices *must* be cost-based and that all providers of telecommunications services have equal rights to interconnect

with the incumbent LECs' networks, *i.e.*, use of the network or unbundled features and functionalities of the network. Indeed, the very first provision of the new legislation states the general principle: "[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). No distinctions are made here between one type of carrier and another.[4]

1. The 1996 Act Calls for the Opening of the Incumbent LEC Network to all Telecommunications Carriers for the Provision of Telecommunications Services

The 1996 Act, however, also recognizes the unique role of the incumbent LEC network to the development of local competition and the further maturation of long distance competition. Over and above the general obligation of telecommunications carriers to interconnect with each other, the Act has several provisions designed to facilitate the ability of telecommunications carriers to support their own provision of services by using the networks of the incumbent LECs. As the Commission observes in the *Notice*, such use plays a vital role because the ILECs are the gateway for virtually all end users to the "network of networks" and, ultimately, to all other subscribers.[5] Accordingly, true competition requires that telecommunications carriers have efficient access to the LEC networks and, thus, to end users.

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[4] Consistently, the 1996 Act imposes upon *all* telecommunications carriers the duty not to install network features, functions, or capabilities that undermine the Act's vision of a network of networks, where users "seamlessly and transparently transmit and receive information between and across telecommunications networks." 47 U.S.C. § 256(a)(2); *see* 47 U.S.C. § 251(a)(2).

[5] *Notice* ¶ 8.

The 1996 Act directs the ILEC networks to be made available to all telecommunications carriers as an input to their services in several ways. First, ILECs have the duties to provide interconnection for the facilities and equipment of any requesting telecommunications carrier with their networks:

- for the transmission and routing of both local exchange and interexchange access service,
- at any point within the network that the requesting carrier chooses, provided it is technically feasible,
- in a manner that is *equal in quality to that provided by the ILEC to itself* and any other telecommunications carrier, and
- at rates that are cost-based, just, reasonable, and nondiscriminatory.[6]

In addition, the 1996 Act requires that the ILECs make available, pursuant to regulations to be adopted by the FCC, unbundled network elements to any requesting telecommunications carrier for the provision of telecommunications service.[7] These network elements must be made available in a way that allows requesting carriers to combine these network elements as inputs into their own telecommunications services as they deem appropriate.[8] The rates for these unbundled network elements must be cost-based, just, reasonable, and non-discriminatory.[9] Underscoring the 1996 Act's requirement that the local network be opened up for use by all carriers is the further requirement that ILECs

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[6] 47 U.S.C. §§ 251(c)(2)(A)-(D); *see also* 47 U.S.C. § 252(d)(1) (just and reasonable rates under Section 251(c)(2) must be based upon costs and may include a reasonable profit).

[7] 47 U.S.C. § 252(c)(3).

[8] *Id.*

[9] *Id.*; *see also* 47 U.S.C. § 252(d)(2).

make publicly available, and update, the information other carriers will need for the transmission and routing of information using the ILEC's facilities or networks.[10]

Finally, under the new Act, arrangements for use of the ILEC networks entered into between ILECs and other telecommunications carriers, and approved by state or federal regulators, are to be made available for public inspection. All carriers will be able to obtain access to an ILEC network on the same terms and conditions made available to any other carrier.[11]

This treatment of the ILECs' networks reflects Congress's understanding that alternative local exchange networks will not be built overnight and, in some areas, may not be built at all. The availability of the ILEC network at cost-based nondiscriminatory rates is a necessary bridge to a competitive environment where alternative networks are economic to build. Such availability is also the threshold requirement for competition of any form in areas where the existing networks will not be duplicated for some time. Indeed, the ILEC networks may, in some cases, remain the only choice for most telecommunications carriers in the long term.

In sum, the provisions of the 1996 Act speak for the need for the features and functionalities of the ILEC networks to serve as a foundation upon which telecommunications carriers may add other functionalities to provide retail services. All telecommunications carriers are to have access to the local network in the manner they deem appropriate and to pay for that use based upon the costs they impose upon the network. In essence, the new

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[10] 47 U.S.C. § 251(c)(5).

[11] 47 U.S.C. §§ 252(h) and (i).

Act establishes the networks of the ILECs as common resources to be used by all telecommunications carriers — not just the ILECs — as an input into their own retail services.

2. The 1996 Act Provides That All Telecommunications Carriers Are to Be Treated in a Nondiscriminatory Manner Regarding Use of the Local Network: The Instant Rulemaking Should Be Folded into the Commission's General Proceeding Required by Section 251(d) of the 1996 Act

In providing that all telecommunications carriers shall have nondiscriminatory, cost-based access to the ILEC network, the Act makes no distinctions based upon historical labels (*e.g.*, IXC, CMRS provider, independent LEC), type of technology (*e.g.*, wireline, wireless, cable), or the nature of traffic (*e.g.*, interstate, intrastate, local, toll). In the present era, marked by the convergence of telecommunications services, the barriers separating carriers are breaking down, as all carriers enter the others' traditional domains. In this context, it is natural and right that interconnection requirements no longer turn upon these soon-to-be, if not already, defunct distinctions.

The Commission, in its *Notice*, appears to acknowledge that the time has come to focus on use of the ILEC network in a consistent manner, freed from the regulatory baggage of an earlier time (however necessary it may have once appeared). Observing that "[d]ecisions in this proceeding are clearly related to those in other ongoing rulemakings that address interconnection and related issues between various telephone service providers," the FCC acknowledges in the *Notice* that "[i]nterstate access is essentially another form of *interconnection between networks*, that between LECs and IXCs."[12] Indeed, the agency took the next logical step in this line of thinking: "as a matter of long-term policy, there may be important reasons why the regulatory regime for interstate access charges should not vary

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[12] *Notice*, ¶ 17 (italics added). *See also id.*, ¶ 77.

dramatically from the rules relating to LEC-CMRS interconnection, to the extent that LEC-CMRS and LEC-IXC interconnections use similar features and functions."[13] CompTel submits that, what may have appeared as a long-term policy choice on the far side of February 8, 1996, — the day the new legislation was enacted — now is the law of the land: new Section 251(c)(2)(A) makes clear that exchange access, *i.e.*, access for providers of toll telephone service, is a form of interconnection with the ILEC's network.

Under the 1996 Act, to the extent that carriers use the same features and functions of the local network, they must pay the same charges, and those charges must be cost-based. This is not a long-term policy goal, it is a congressional directive that the FCC must implement. In particular, because the new legislation requires that the interconnection between ILECs, on the one hand, and CMRS providers, IXCs, and all other telecommunications carriers, on the other hand, must all be guided by the same principles, the instant rulemaking must, in essence, be folded into the general rulemaking the Commission is directed to conduct pursuant to Section 251(d)(1). As the 1996 Act makes no distinctions between telecommunications carriers for purposes of using the ILEC networks, a separate proceeding to examine interconnection policies and pricing principles for CMRS providers separately from all other carriers is no longer warranted.

In the next section of its comments, CompTel will focus on the FCC's jurisdictional authority, indeed its obligation, under the 1996 Act to establish the principles by which rates for interconnection to the incumbent LECs' networks must be governed. CompTel will then discuss the general principles which should govern such pricing. The final section of these

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[13] *Id.*

comments will address the question of CMRS providers levying access charges for the termination of interexchange calls on their networks.

III. THE TELECOMMUNICATIONS ACT PROVIDES THE COMMISSION WITH THE AUTHORITY TO ESTABLISH GUIDELINES FOR THE PRICES ILECs MAY CHARGE OTHER CARRIERS FOR USE OF THEIR NETWORKS

The Commission has both the jurisdiction and the obligation to adopt regulations that govern the prices charged by ILECs for use of their networks by other telecommunications carriers.

A. The Act Establishes a Strong Federal Policy to Promote Telephone Exchange Service and Exchange Access Competition on Both an Interstate and Intrastate Level

The Act affirms a strong federal policy of promoting the development of local service competition and access to the ILEC networks. The Act sets forth a number of obligations designed to facilitate entry,[14] including (but certainly not limited to) the elimination of restrictions on resale of local services, mandatory number portability and dialing parity, and nondiscriminatory access to rights-of-way.[15] Moreover, Section 251(c) of the Act imposes specific obligations on incumbent LECs to ensure that all telecommunications carriers have use of the ILEC networks, including access to network elements unbundled from ILEC services and unneeded functions.

Because of this strong federal policy, the Act vests the FCC with responsibilities over aspects of local service competition without interstate/intrastate divisions. An ILEC's interconnection obligations under the 1996 Act, for example, are not limited to interstate

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[14] In addition, state restrictions which would prohibit or "have the effect of prohibiting" entry in local services—and thereby impede the achievement of Congress' policy objectives—were explicitly preempted by the Act. 47 U.S.C. § 253(a).

[15] *See, e.g.*, 47 U.S.C. §§ 251(b).

aspects of the ILEC network. Rather, the obligations are broadly worded, applying to all services without regard to their traditional jurisdictional classification.[16] While the 1996 Act preserves and assigns several important functions to state commissions, the exercise of those functions are governed by federal standards enunciated in the Act and are to be articulated in FCC regulations adopted pursuant to Section 251(d). Thus, in view of the clearly expressed Congressional policy to promote competition among all telecommunications carriers, the only interpretation consistent with these provisions of the statute is that the FCC must establish rules which govern both the interstate and intrastate aspects of ILEC interconnection.

B. Implementation of the Federal Policy Requires the Commission to Establish Pricing Guidelines for Use of the ILEC Network by Telecommunications Carriers

The FCC is responsible for "establish[ing] regulations to implement" the interconnection requirements of Section 251.[17] This responsibility confers a comprehensive duty to articulate national policies in as concrete detail as appropriate, to determine when regulations are needed to implement the policies, and to establish the content of those regulations. An important aspect of the duty to implement Section 251 is to establish pricing principles which govern the ILECs' charges for the facilities and services mandated pursuant to Section 251(c).

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[16] For example, ILECs must provide "for the facilities and equipment of any requesting telecommunications carrier" interconnection ". . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). The critical terms "telecommunications carrier," "telephone exchange service," and "exchange access" are defined without limitation to interstate services. *See* 47 U.S.C. §§ 153(r) ("telephone exchange service"); 153(40) ("exchange access"); 153(49) ("telecommunications carrier").

[17] 47 U.S.C. § 251(d)(1).

1. Section 251 Requires ILECs to Price Interconnection and Access to Unbundled Network Elements at Just, Reasonable, and Nondiscriminatory Rates

Section 251 requires, *inter alia*, that ILECs provide requesting telecommunications carriers with necessary interconnection services, including "exchange access," and with access to unbundled network elements. In addition to obligations relating to the type, quality and timing of these services, the Act requires ILECs to offer these services on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory,"[18] and requires that such rates be cost-based.[19] CompTel submits that the Commission cannot fulfill its responsibility to implement these Section 251 requirements without providing guidance as to the circumstances in which ILEC prices will be considered "just, reasonable, and nondiscriminatory," and "cost-based."

The Commission cannot leave such a critical question to chance. For the near term, new entrants must rely heavily on the ILEC networks. They therefore will be vulnerable to price discrimination. It is essential that the Commission implement not only Section 251's requirements of open access to ILEC networks and functionalities, but the requirement that these networks and their functionalities be provided to them in a non-discriminatory manner at cost-based rate levels.

2. The Establishment of Federal Policy Guidelines Is Consistent with the States' Role Under Section 252 of the Act

The states have an important role under the new regulatory regime in setting and approving specific prices charged by ILECs for interconnection. CompTel believes that,

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[18] *See* 47 U.S.C. §§ 251(c)(2)(D) (interconnection); 251(c)(3) (unbundled access); 251(c)(6) (collocation).

[19] 47 U.S.C. § 252(d)(1)(A)(i) (referencing Sections 251(c)(2) and (3)).

while the Act clearly intends that the Commission will set national guidelines and standards, implementation of those standards in local markets will be the primary responsibility of the states.[20] In short, the FCC must establish the principles generally applicable to ILEC pricing, but the states decide whether the actual rates proposed by an ILEC are consistent with those principles.[21]

Under Section 252 of the Act, state commissions are responsible for evaluating an ILEC's actual interconnection terms and conditions. An ILEC may arrive at interconnection terms and conditions in three ways: (1) it may negotiate such an agreement with a competing provider, (2) it may have an interconnection agreement set through arbitration at the state PUC, or (3) failing the negotiation or arbitration of an actual agreement, it may submit a statement of the terms and conditions upon which interconnection will be offered. Each one of these options requires state PUC approval, and each draws upon the interconnection obligations in Section 251, and regulations to be articulated by the FCC.[22] In order to

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[20] *See* 47 U.S.C. § 252(e) (states have primary responsibility for approving interconnection agreements); 47 U.S.C. § 252(c) (state commissions will arbitrate disputes over terms and conditions of interconnection agreements according to the FCC's Section 251 regulations).

[21] Under the 1996 Act, State commissions are free to enforce their own regulations, orders, and policies regarding interconnection and access provided they are consistent with Section 251 of the new Act and they do not substantially prevent implementation of the requirements of Section 251, including the FCC's implementing regulations, and the purposes of Part II of the 1996 Act (47 U.S.C. §§ 251-261). *See* 47 U.S.C. § 251(d)(3)(C).

[22] Under the 1996 Act, interconnection may occur pursuant to either voluntarily negotiated or compulsorily arbitrated interconnection agreements. 47 U.S.C. §§ 252(a) and (b). Further, Bell operating companies may seek State approval of statements of terms and conditions pursuant to which the BOCs will make interconnection generally available, albeit they are still obligated to negotiate requests for interconnection in good faith even if such a statement is approved. 47 U.S.C. § 252(f). In the case of compulsorily arbitrated agreements and statements of generally available terms and conditions, specific reference is made in the statute to compliance with the FCC's regulations adopted pursuant to

(continued...)

enable the states to perform this function, the FCC must establish federal principles applicable to an ILEC's pricing of interconnection and access services.

In the case where a state arbitrates an interconnection dispute, Section 252(d) of the Act provides guidance on the proper methodology for states to evaluate a proposed rate.[23] Section 252(d) refers only to a state commission's determinations, but says nothing about the FCC's power to prescribe more specific standards for ILEC pricing. Moreover, these pricing standard provisions must be read in conjunction with Section 251, to which they explicitly refer, which articulates the over-arching standards applicable to all ILECs and requires the FCC to "implement" them. Congress granted the FCC the power in Section 251 to prescribe regulations relating to ILEC interconnection obligations; Section 252 cannot be read to take that grant away *sub silentio*, albeit the FCC's regulations must be consistent with Section 252 pricing standards. Nothing in Section 252(d) is inconsistent with the idea of the FCC prescribing particular standards to govern the way that ILECs establish cost-based prices for use of their networks. Thus, the Commission can (and should) identify appropriate principles to govern the cost-based pricing required under the 1996 Act.

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[22](...continued)
Section 251(d). *See* 47 U.S.C. §§ 252(c)(1) and 252(e)(2)(B). While the sections governing state approval of voluntarily negotiated agreements do not make express reference to the FCC's implementing regulations, the State commissions may reject any agreement (or portion thereof) which is discriminatory against non-parties or is not consistent with the public, convenience and necessity. Moreover, as a practical matter, once cost-based rates are arbitrated, those rates will be available to all carriers under the Act's non-discrimination provisions. Carriers subsequently will thus unlikely be willing to negotiate for a higher rate. *See* note 36, *infra*.

[23] 47 U.S.C. § 252(d) (requiring determinations of rates pursuant to Section 251(c)(2) and (c)(3) to be based on cost and be nondiscriminatory).

3. The Establishment of National Pricing Guidelines Is Necessary Under Other Provisions of the Act

For the reasons shown above, federally-prescribed pricing principles are consistent with the division of responsibilities created by Sections 251 and 252 of the Act. In another context where Section 251 standards are relevant — BOC applications for in-region interLATA authority — the FCC similarly needs to articulate uniform principles applicable to BOC pricing.

Under Section 271 of the Act, a BOC may apply to the Commission for in-region interLATA authority upon a determination by the FCC that the BOC has satisfied certain specified conditions.[24] One of the conditions requires the FCC to certify the BOC's compliance with the fourteen-point "competitive checklist."[25] In order to do so, however, the FCC must, *inter alia*, find that the BOC has fulfilled its interconnection obligations pursuant to Section 251(c)(2) and its unbundling obligations pursuant to Section 251(c)(3).[26] Both of these provisions require that the rates of such interconnection or unbundled access be "just, reasonable, and nondiscriminatory" and, in conjunction with Section 252(d)(1), that such rates be cost-based. As is the case with providing necessary guidance to state determinations pursuant to Section 252, the FCC's evaluation of the competitive checklist requires the formulation of clear principles governing ILEC (of which the BOCs are a subset) pricing.

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[24] 47 U.S.C. § 271(d)(1).

[25] 47 U.S.C. §§ 271(c)(2)(A)(i) and (ii).

[26] 47 U.S.C. § 271(c)(2)(B)(i) and (ii).

In sum, therefore, the 1996 Act makes clear that the FCC has the authority and obligation to articulate pricing principles governing the rates that ILECs may charge telecommunications carriers for use of the ILECs' networks.

IV. CHARGES FOR USE OF THE ILEC NETWORKS MUST BE COST-BASED AND NONDISCRIMINATORY BASED UPON THE FEATURES AND FUNCTIONS USED BY TELECOMMUNICATIONS CARRIERS

The bulk of the *Notice* addresses the issues surrounding compensation for interconnected traffic between ILECs and CMRS providers. The FCC proposes that, for at least an interim period, interconnection rates for local switching facilities and connection to end users be "priced" on a zero-rate basis, sometimes labelled as "bill and keep."[27] The Commission proposes further that rates for dedicated transmission facilities connecting ILEC and CMRS networks should be based on existing access charges applicable to IXC-ILEC interconnection *i.e.*, access, for "similar transmission facilities."[28] The Commission also seeks comment on a long-term approach to ILEC-CMRS interconnection pricing, recognizing that the zero-rate option may not be the most desirable method of mutual compensation. However, the FCC tentatively concludes that whatever pricing mechanism is adopted, it should be symmetrical, *i.e.*, the LEC and CMRS provider should pay each other the same amount for terminating the same volume of traffic that originates on the other's network, at least with respect to the network elements that correspond to the loop and serving switch.[29]

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[27] *Notice*, ¶ 3.

[28] *Id.*

[29] *Id.* ¶ 78.

A. The Rates for Use of the ILEC Networks by Telecommunications Carriers Must Be Cost-Based

The 1996 Act gives the Commission very clear guidance as to the basis for rates for use of the incumbent LECs' networks by telecommunications carriers for the transmission and termination of traffic. The Commission's implementing regulations must be consistent with the pricing standards set forth in Section 252(d), which govern the prices that incumbent LECs may charge for interconnection, access, and network elements, *i.e.*, the local network inputs to telecommunications services.

The Act provides that just and reasonable rates for interconnection under Section 251(c)(2) and for unbundled network elements under Section 251(c)(3) shall be determined "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element" and "may include a reasonable profit."[30] In addition, the terms for reciprocal compensation shall only be considered just and reasonable if "the additional costs of terminating" calls originating on the other carrier's network are the basis for such compensation.[31] Thus, pursuant to the 1996 Act, it is clear that the only lawful route for the Commission is to adopt pricing rules that require cost-based rates.

By definition, cost-based pricing will reflect the way in which the network is used. If the LEC network is used by CMRS providers and IXC providers in a functionally equivalent way, as the *Notice* suggests,[32] then the carriers should all gain access to the network at the same prices. Differences in price should not reflect distinctions other than those related to

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[30] 47 U.S.C. § 252(d)(1).

[31] 47 U.S.C. § 252(d)(2).

[32] *Notice*, ¶ 77.

costs. The 1996 Act makes no distinctions among telecommunications carriers or interstate and intrastate services when it comes to use of ILEC networks. As a result, the FCC's suggestions that distinctions between CMRS interconnection and IXC access pricing may be justified because of concerns about facilitating the competitive development of CMRS or on the basis of jurisdictional separations do not pass muster under the new Act. The marketplace, not regulators, should determine the success of all providers, including CMRS providers. For purposes of the use that CMRS providers and IXCs make of the ILEC networks, they must receive the same treatment as all other telecommunications carriers.

Thus, in the final analysis, interconnection and access prices should be based upon economic costs. Once those costs are determined, the analysis may suggest that the actual cost of local termination with respect to local switching facilities and the local loop on all networks is at or near zero. In such an environment, regulators may conclude that the carrier serving each end user — including IXCs as they develop local subscriber bases — may permit free access to their subscribers from all service providers. The propriety of this arrangement, however, must follow a determination of the costs of termination.[33] Moreover, if a zero rate is appropriate for mutual compensation between interconnecting carriers, then local switching and the local loop must be available to all carriers at the zero rate under the nondiscrimination provisions of the 1996 Act.

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[33] CompTel acknowledges that the 1996 Act explicitly does not preclude the use of "bill and keep" arrangements to provide for reciprocal compensation for the termination and transport of communications. *See* 47 U.S.C. § 252(d)(2)(B)(i). However, CompTel submits that the Act thereby merely recognizes that regulators may conclude, *after* they have determined what are the costs associated with the transport and termination of traffic on two interconnected networks, *see* 47 U.S.C. § 252(d)(2)(A), that a bill and keep mechanism appropriately compensates each party for the costs imposed on its network by the other.

B. The 1996 Act Provides That Interconnection Agreements Be Subject to Regulatory Approval and Available for Public Inspection and That the Terms and Conditions of Such Agreements Be Generally Available to Other Carriers

At bottom, the concerns expressed in the *Notice* about the potential for abuse by the incumbent ILEC because interconnection agreements are not public stems from an obsolete approach to LEC-CMRS interconnection arrangements. To date, the Commission observes, while LECs and CMRS providers are obligated to negotiate interconnection arrangements in good faith, such arrangements have neither been subject to regulatory approval nor made available for public inspection.[34] Recognizing the potential this situation created for abuse, the FCC in Docket 94-54 sought comment on whether ILECs should be required to file tariffs to specify CMRS interconnection offerings, file their CMRS interconnection arrangements with regulators for public inspection, or include a "most favored nation" clause in such arrangements to eliminate discriminatory treatment.[35] The Commission's observations and experiences regarding the potential ills resulting from non-public interconnection arrangements serve as a useful foil to highlight the now mandatory safeguards contained in the 1996 Act.

First, as discussed above, rates must be cost-based. Second, the interconnection arrangements must be approved by state commissions or the FCC pursuant to the regulations established by the FCC under Section 251(d)(1).[36] Third, the 1996 Act requires that an

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[34] CMRS Equal Access and Interconnection Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5455-56 (1994).

[35] *Notice* ¶ 82. *See also* 9 FCC Rcd at 5457.

[36] While Section 252(e) makes a distinction between the standards for approval of agreements arrived at through negotiation as opposed to State PUC compulsory arbitration (with only the latter explicitly requiring compliance with the FCC's Section 251 regulations and the pricing standards of Section 252(d)), prices arrived at through the compulsory

(continued...)

agreement for use of an ILEC network approved by state or federal regulators must be made available for public inspection and copying within ten (10) days after approval.[37] Finally, new Section 252(i) requires that ILECs make available interconnection, services, and network elements to any other requesting telecommunications carrier upon the same basis and conditions as those provided in the agreement.[38]

Accordingly, the 1996 Act, in one fell swoop, resolves two sets of issues raised in the *Notice*. One, safeguards are required that, if properly implemented, will ensure that compensation arrangements will not lead to excessively high or anticompetitive rates. Two, the Act obviates the issues raised in the *Notice* regarding the public availability of agreements for use of the ILECs' networks. The 1996 Act makes clear what the FCC (and the states) should do — indeed, must do — to counter potential abuse of ILEC market power when they negotiate arrangements for use of their networks with CMRS providers and other telecommunications carriers. Because regulators now have the mandate to review agreements for use of the ILECs' networks for cost-based rates, the arrangements are far more likely to be economically efficient as well as nondiscriminatory.

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[36](...continued)
arbitration process should by-and-large dictate those arrived at through subsequently negotiated arrangements. The reasons for this are two-fold. First, carriers requesting use of an ILEC's network can always resort to compulsory arbitration if they cannot obtain cost-based rates. Arbitration is available if the requesting carriers negotiate in good faith, and CompTel submits that negotiating for cost-based, nondiscriminatory rates is, by definition under the 1996 Act, good faith negotiation. *See* 47 U.S.C. §§ 251(c)(2)(D), 252(e)(2)(A)(i). Second, the terms and conditions of arrangements for the use of the ILECs' networks reached through compulsory arbitration (or voluntary negotiation) must be made available to other carriers requesting negotiation. 47 U.S.C. § 252(i).

[37] 47 U.S.C. § 252(h).

[38] 47 U.S.C. § 252(i).

C. CMRS Providers Should Pay the Same Charges for Use of the ILECs' Networks as IXCs

In the *Notice*, the Commission tentatively concludes that "interconnection rates for local switching facilities and connections to end users should be priced on a 'bill and keep' basis . . . and that rates for dedicated transmission facilities connecting LEC and CMRS networks should be set based on existing access charges for similar transmission facilities."[39] As CompTel noted above, an analysis of the actual cost of local termination with respect to local switching facilities and the local loop on all networks may show that the costs are at or near zero. In such a case, "bill and keep" as tentatively proposed by the Commission may be warranted on the basis of costs. Unless such zero-rate pricing is cost-justified, however, the 1996 Act would not allow it. In any event, CompTel submits that these matters are best studied in the context of the more comprehensive proceeding required under Section 251(d), and CompTel intends to brief these issues more fully in that rulemaking.

With regard to transport between CMRS and LEC networks, the same cost-based pricing and nondiscrimination principles enunciated earlier in these comments should apply. As an initial matter, the application of these principles will lead to the result that CMRS providers and IXCs pay the same for use of an ILEC's network to the extent each use the same features and functions. As the FCC notes, "the dedicated transport facilities used to connect LEC and IXC networks are similar or identical to the facilities connecting LEC and CMRS networks."[40] Thus, as the Commission concludes—and this is the only result that is

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[39] *Notice* ¶ 3.

[40] *Notice*, ¶ 64.